STATE CAPITOL
ROOM 205
SACRAMENTO, CA 95814
TEL (916) 651-4006
FAX (916) 323-2263

DISTRICT OFFICE
1020 N STREET, ROOM 576
SACRAMENTO, CA 95814
TEL (916) 651-1529
FAX (916) 327-8754

California State Senate

SENATOR
DARRELL STEINBERG
PRESIDENT PRO TEMPORE
SIXTH SENATE DISTRICT

STANDING COMMITTEES:
SENATE RULES
CHAIR
APPROPRIATIONS
PUBLIC SAFETY

March 28, 2012

The Honorable Dianne Feinstein
United States Senate
331 Senate Hart Office Building
Washington, DC 20510-0504

Dear Senator Feinstein: Dianne

Thank you for your letter of March 8 voicing your concern that small businesses in California are being financially burdened and threatened by lawsuits and demand for money letters for often-minor violations of the Americans with Disabilities Act (ADA) and our state law, the Unruh Civil Rights Act. I want to address both the Legislature's recent actions in reducing unnecessary litigation and the flaws in Senator Dutton's proposed legislation.

The California Legislature shares your serious concerns; in 2008, after nearly 20 months of discussions and negotiations with numerous stakeholders, we enacted a multi-faceted bill to attack the problem on multiple levels. SB 1608 (Corbett, 2008), which I co-authored and which became effective January 1, 2009, was supported by California Chamber of Commerce, the California Restaurant Association, the California Business Properties Association, and the California Hotel and Lodging Association. The core objectives behind SB 1608 were to encourage ADA compliance, protect those businesses that have attained compliance or are in the process of attaining compliance from unnecessary litigation, and clarify the law to reduce a business' exposure to inflated claims of damages and attorney's fees. The same groups above continue to support its provisions as the approach to encourage compliance with the ADA and provide benefits and litigation protections to businesses that have complied or are in the process of attaining compliance.

To encourage ADA compliance, SB 1608 provides benefits and litigation advantages to a business that uses a Certified Access Specialist (CASp) to inspect for disability access compliance and recommend any necessary repairs. (The Certified Access Specialist Program is a state voluntary certification program for any person who meets the specified criteria and passes the Certification Examination as a CASp. A minimum of five years of field experience is necessary to pass the exam. Since its inception in October 2008, the program has grown to 410 CASp inspectors throughout the state, with about 75 to 100 inspectors added each year. The program is designed to meet the public's need for experienced, trained, and tested individuals who can render opinions as to the compliance of buildings and sites with the State of California codes and regulations and Americans with Disabilities Act (ADA) for accessibility.) Businesses that choose to obtain CASp certification may access the Division of State Architect's website public listing of all inspectors, with their names, addresses and contact information.

Businesses that use a CASp are provided valuable benefits and protections. Upon completion of the CASp inspection and report, a business is given a numbered, conspicuous CASp certificate for display on the

property indicating that it has been CASp inspected. One inspector reported that every property which received a CASp certificate from him has never been sued in an ADA lawsuit. (*Tahoe Daily Tribune*, January 17, 2011 "ADA lawsuits: Certified Access Inspections a lifeline against them, experts say.")

In addition, if a business uses a CASp and is still sued for an alleged construction-related accessibility violation, the business is entitled to a 90-day stay of the proceedings and an early court evaluation conference within that 90-day period. This procedure gives businesses that have attained compliance or are in the process of attaining compliance the ability to show those efforts at a very early stage of the proceedings and seek to avoid lengthier litigation that drives up attorney's fees. Presented with evidence that the business has fixed the problem, a court could signal its inclination to end the case if it proceeded further. The court could also limit any subsequent court award of damages and attorney's fees when the litigation is protracted by the plaintiff to coerce a higher settlement or to run up the attorney's fee award. These stay and early court evaluation provisions were also designed to discourage and deter those highly publicized lawsuits and demand letters that seek a nuisance settlement from businesses wary of costly, extended lawsuits.

SB 1608 further clarified the law for awarding damages and attorney's fees to deter frivolous allegations used to drive up damages and attorney's fees awards. It provides that a person may sue and collect damages for a construction-related accessibility violation only when the person is denied full and equal access to a place of accommodation because he or she personally encounters the construction-related accessibility barrier or is deterred from accessing the site on a particular occasion. It also provides that not every violation of a construction-related accessibility standard constitutes a separate offense entitling a plaintiff to a separate award of statutory damages, even if the plaintiff personally encountered more than one violation. A restaurant, convenience store or theater normally serves only one function -- a place to eat, shop or watch a movie -- and multiple violations of one or more construction-related accessibility standards at such a place do not constitute separate denials of full and equal access. These changes were significant clarifications of the previous law. They addressed the "extortionate" nature of some demand letters or lawsuits that alleged tens or hundreds of ADA violations on a single visit in order to boost the plaintiff's damages and attorney's fees award or, at the very least, increase the settlement value of a claim.

When I read the demand letters you enclosed from businesses threatened with an ADA lawsuit, SB 1608 appears to have had impact. The cases brought in 2006 and 2008 cannot be brought today, at least for the same liability amounts, and perhaps not at all because of our changes through SB 1608 clarifying the liability and damages law. Similarly, the post-SB 1608 demand letters that were sent to me propose a much lower range for a quick settlement for mostly $5,000 to $6,500; far less than the demands of $25,000 to $50,000 and more that were commonly made prior to the enactment of SB 1608. (I would observe that one of the attached letters involved a settlement of a pending case in federal district court, *Yates v. Guerrero.* The other 11 post-SB 1608 letters were pre-litigation demand for money letters and there is no indication whether any of the businesses paid any settlement.)

SB 1608 has made a difference. (The attached summary describes the key provisions of SB 1608 in greater detail.)

Some "professional plaintiffs" have continued their practice of sending pre-litigation demand letters for immediate settlement, albeit for significantly lower amounts. Pursuant to SB 1608, any demand for money letter must now be accompanied by a statutory advisory notice to the business detailing its legal rights, options and responsibilities. In a review of SB 1608's effectiveness, we learned that some attorneys were bypassing that law by contending that the advisory notice is not required with a demand letter when they have yet to decide to file a follow-up lawsuit or they were going to file the lawsuit in federal court. In those cases, that left the business unaware of its legal rights and options and subject to

costly settlement pressure. Thus, SB 384 (Evans - 2011) was enacted last year to close that loophole and requires the advisory notice to be provided with any demand for money letter regardless of whether the attorney intends to file a complaint or files a complaint in state or federal court. To strengthen enforcement of that provision, SB 384 provides that an attorney who fails to give the required notice would be subject to disciplinary action, which could include a suspension or revocation of the person's license to practice law.

You wrote that SB 1186 has been introduced by Senator Dutton to address the issue further. That bill would require a party asserting an ADA and Unruh Civil Rights violation to first give notice of the asserted violation to the business as a pre-requisite to filing any lawsuit. The business would then have 30 days to respond to the notice and would have an additional 90 days to remedy any violation. If the asserted violation is corrected within this 120-day cure period, the business is relieved from any liability under the Unruh Civil Rights Act for damages and attorney's fees for the violation.

This "right-to-cure" proposal has been introduced on several occasions in the past and has been consistently rejected by the Legislature. The disability rights community, along with other civil rights communities, objected strongly to any "right-to-cure" law that would allow longstanding ADA and Unruh Civil Rights violations to continue uncorrected until there is a notice of the violation, and then relieve the business of any liability for that violation if the violation is corrected within the allotted cure period. Persons with disabilities in California are frustrated that many businesses are still out of compliance with a law that has been in effect for nearly 20 years. No other violation of the Unruh Civil Rights Act is allowed a "right-to-cure." No other protected class under the Unruh Civil Rights Act would be subjected to this provision in the enforcement of their civil rights.

In addition, SB 1186 would remove any incentive created by SB 1608 to encourage businesses to attain ADA compliance by hiring a CASp to identify violations and recommend corrective actions. In fact, I believe SB 1608 already achieves the same end sought by SB 1186 – a period for a business to show compliance with the ADA laws while limiting a business's liability for damages and attorney's fees when compliance is shown.

However, one federal district court in the Eastern District of California has ruled that these SB 1608 procedures and protections do not apply to ADA and Unruh Act actions brought in federal court, as the state law is in conflict with federal law and procedure (*O'Campo v. Chico Mall (2010)*). The same groups in support of SB 1608 are looking at ways to correct that situation. One idea being considered is to seek federal legislation to require federal courts to follow state procedure, just as it is now required to follow state law, when a claim is asserting a violation of the ADA under both federal and state law in federal court. Would you consider sponsoring legislation to ensure that SB 1608's benefits and protections inure to businesses even when the claim in filed in federal court?

I assure you that the California State Legislature is aware of the problem that a few professional plaintiffs continue to pose for small businesses. We will continue to monitor the workings of the legislation to see if further efforts are needed to encourage compliance and deter threats of frivolous lawsuits.

Sincerely,

DARRELL STEINBERG
Senate President Pro Tempore
Sixth Senate District

SB 1608 (Corbett, Harman, Steinberg, Runner & Calderon; Smyth, Wolk, and Jones)
FACT SHEET

Education for architects and building inspectors will improve disability access compliance.

- SB 1608 requires, for the first time, that architects and building inspectors complete specified hours of continuing education coursework in disability access-specific requirements. This responds to complaints by both the disability community and the building community that some architects and building inspectors are not sufficiently educated in disability access requirements.

Local building agencies must have Certified Access Specialist (CASp) to advise property owners and the builders and the general public on new construction plan checks, permitting and inspections, effective July, 2010, and must have a sufficient number of CASp to do plan check and permitting functions for new construction projects after July 1, 2014.

- This provision addresses a significant concern of the building community which asserts that property owners frequently find that even though their projects have passed the plan check and permitting process, and have passed final inspection, some are still being sued for construction-related access violations which were not caught during the permitting and inspection process. These omissions impede compliance efforts. In response, SB 1608 requires local building departments to have CASp personnel, trained in construction-related access requirements, available to the public for consultation on permitting, plan check and inspection issues, and, to perform plan checking and permitting for new construction projects to ensure compliance with construction-related disability standards, as specified.

Division of State Architect (DSA) must prepare and submit, by December 31, 2010, proposed amendments to the United States Department of Justice that would make the California standards for disability access conform with federal regulations.

- Another issue impeding compliance efforts by property owners is the conflict between state and federal regulations in many construction-related access requirements. Property owners in compliance with state regulations have been sued for violating the federal ADA, and vice versa. Even though the DSA has been mandated for years to bring California standards into compliance with federal regulations, with stricter California requirements as permitted by the federal regulations, DSA has yet to fulfill its responsibility, leaving property owners exposed to avoidable litigation and depriving persons with disability full and equal access to places of public accommodation. Pursuant to other provisions in SB 1608 favoring the application of more protective California standards, stricter California standards as allowed would be used for purposes of the preparation and submittal of the proposed amendments.

SB 1608 codifies a standard for assessing statutory damages that reflects case law allowing a person to sue and collect damages when the person is denied full and equal access to a place of public accommodation because he or she personally encounters the construction-related accessibility barrier or is deterred from accessing the site on a particular occasion.

- The provision seeks to acknowledge that a place of public accommodation may include distinct facilities that offer distinct services, the full and equal denial of access to which may lead to separate offenses, depending on the factual circumstances (e.g., a resort patron being denied full and equal access to the resort's hotel room and to the adjoining golf course or bocce court may be separate offenses of denial of full and equal access for which separate statutory damages may be awarded, depending on the factual circumstances). At the same time, it also clarifies that not every violation at a facility will constitute a separate full and equal access offense (e.g., a person staying at a hotel room with a defective bathroom in each of its 400 hotel rooms is denied full and equal access to the guestroom's bathroom he or she intends to

access, but is not entitled to statutory damages awards for the other defective bathrooms he or she does not intend to access).

- Guidance to courts in awarding damages. SB 1608 provides that damages may be recovered in a construction-related accessibility claim only when the plaintiff either personally encounters a violation on a particular occasion or is deterred from accessing a place of public accommodation on a particular occasion. With respect to deterrence, a plaintiff must, among other requirements, have had actual knowledge of the violation or violations in order to be deterred, based on the circumstances of the individual's experience. In addition, the intent language provides that not every violation of a construction-related accessibility standard constitutes a separate offense entitling a plaintiff to a separate award of statutory damages, even if the plaintiff personally encountered more than one violation. A restaurant, convenience store, or theater normally serves only one function -- a place to eat, shop, or watch a movie -- and multiple violations of one or more construction-related accessibility standards at such a place do not constitute separate denials of full and equal access.

SB 1608 will encourage businesses to use a Certified Access Specialist (CASp) to inspect for physical access compliance but preserve plaintiff's right to recover for damages for a violation.

- Every local building department must have a CASp available to provide consultations initially, and eventually perform permit and plan checking review and approval of a new construction project in order to minimize the inadvertent approval of projects that do not meet accessibility requirements.

- SB 1608 requires a CASp, when he or she inspects a site, to issue a report stating whether the site meets applicable construction-related accessibility standards, and where it does not, to provide recommendations for repairs. The CASp would also issue a CASp inspection certificate which the business would be permitted to display on its premises. (However, that certificate or the inspection report does not immunize a business from liability for a construction-related accessibility violation if a violation exists on the site and deprives a person with disability full and equal access to the property. Thus, this process does not affect a plaintiff's right to sue for damages for a violation.)

- SB 1608 requires the CASp to use the generally higher state standard to assess compliance with disability access requirements unless the federal standard is more protective of accessibility rights, where there is a conflict between a state and federal disability access standard.

A qualified defendant sued for an alleged physical access violation may request a limited stay and early evaluation conference to try and settle any construction-related access claims. (Effective July 1, 2009.)

- SB 1608 allows a business owner who obtained an inspection and report from a CASp (a "qualified defendant") and who is later sued on a construction-related accessibility claim to request a streamlined court procedure for a limited stay and an early evaluation of the claim. SB 1608 provides easy-to-use forms for this streamlined court procedure. This stay and early evaluation conference procedure is not a 'right-to-cure' period; nor is it a 'safe harbor' from liability for a violation.

- SB 1608 requires a court, upon application by a "qualified defendant," to issue an order (1) granting a stay of the accessibility claim for 90 days, (2) scheduling a mandatory early evaluation conference within 50 days of the application at which both parties must appear in person unless a party's disability prevents person's appearance in-person, and (3) directing the defendant to file with the court and serve on the opposing party the CASp inspection report at least 15 days before the conference date. The CASp inspection report would be filed under a court seal and protective order so that the confidentiality of the report is maintained for the duration of the claim unless a party shows good cause to the court for lifting the

protective order and seal. The stay would not apply to other causes of actions or claims and also would not apply if the plaintiff has obtained temporary injunctive relief in the accessibility claim. If the defendant fails to file and serve the CASp report prior to the conference, the court would lift the stay at the conclusion of the conference. The court may also lift the stay at the conclusion of the conference upon the plaintiff's showing of good cause.

- SB 1608 requires, at least 15 days before the early evaluation conference, that the plaintiff must provide the court and the defendant with a statement of the specific violations claimed, the amount of damages claimed and attorney's fees and costs incurred. This exchange of information is intended to promote settlement discussions.

- SB 1608 provides that the purpose of the early evaluation conference includes evaluation of (1) whether the defendant is entitled to the temporary stay or has corrected or is willing to correct the alleged violations, and the timeline for doing so, and (2) whether the case can be settled.

- These stay and early settlement conference provisions (and the "demand for money" notices) are not applicable to a claim filed by the Attorney General, district attorney, county counsel, or city attorney.

<u>New Commission on Disability Access will focus on access compliance (May 1, 2009 start)</u>

- SB 1608 creates the 11-member California Commission on Disability Access, an independent state entity of six members from the disability community and five members from the business community, to develop recommendations that will enable persons with disabilities to exercise their right to full and equal access to public facilities and that will facilitate business compliance with the laws and regulations to avoid unnecessary litigation. The Commission's responsibilities will include:
  - Monitoring disability access compliance in California and making recommendations to the Legislature on needed changes in disability access laws. To this end, the Commission will study issues regarding compliance that are raised by either property owners or persons with disabilities.
  - Developing—with the Building Standards Commission—a master checklist for building inspectors to use for disability access compliance, and acting as an information center on disability access requirements.
  - Studying and issuing reports on disability access issues such as whether the Certified Access Specialist (CASp) program—which certifies inspectors who have significant knowledge of disability access laws—is meeting the needs of the disability and business communities.
  - Preventing or minimizing problems of compliance by California businesses by engaging in educational outreach efforts and by preparing and hosting on its Internet Web site a Guide to Compliance with State Laws and Regulations Regarding Disability Access requirements.

<u>An attorney who sends a Demand-for-Money letter or files a complaint is required to provide notice to defendant of specific rights and responsibilities.</u>

- SB 1608 requires an attorney who either sends a "Demand for Money" letter to a business, or files a lawsuit against a business, alleging a construction-related accessibility violation to send a specified notice to the business to help ensure the defendant is aware of his or her legal rights (including the CASp inspection and report provisions) as well as its obligations to comply with the disability access laws. This notice is not a pre-lawsuit notification requirement and does not set up a "right to cure."

-0-